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1 discuss the matter with you.

2 MS. PARK: Judge, if I may be heard. I think at  
3 this point we should do a force order and have him come out,  
4 and if he proves to be disruptive, he will, in fact, have  
5 forfeited his right to be present and his right to testify.  
6 I just don't think -- I mean that is our position, and he  
7 didn't have any problems coming out before with his hands  
8 shackled. I don't really see why he is now having problems  
9 with his legs being shackled.

10 THE COURT: Well, it goes back to what happened  
11 last week.

12 (Pause in proceedings)

13 THE COURT: There are several issues with the force  
14 order. One issue is that there is a team, one team, that  
15 does this for the whole City. They are not in the courthouse  
16 just sitting around waiting for force orders. They may be  
17 here just out of sheer luck, but they could be in Staten  
18 Island. They could be anywhere. So that is one of the  
19 issues.

20 MS. PARK: I have another suggestion. I don't know  
21 how amenable this would be, but if -- I mean I understand  
22 that he is in the holding pends. If Mr. Herlich Your Honor,  
23 the Court Reporter, and myself can go back and put on the  
24 record the condition of how he would have to come out to  
25 court, and if he says that he is still refusing, it would be

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1 on the record.

2 THE COURT: I see that the court reporter is  
3 shaking her head no.

4 MS. PARK: But I think he would behind bars.

5 THE COURT: I am not going to make the court  
6 reporter do anything she doesn't feel comfortable doing.

7 Yes, Sergeant?

8 SERGEANT GELORMINO: The lieutenant is on his way  
9 up. My understanding is based upon the officers going back  
10 inside that he refused in whole.

11 THE COURT: The other issue now is can we do a  
12 force. So it's up to the lieutenant.

13 SERGEANT GELORMINO: I believe they started putting  
14 that in motion.

15 THE COURT: How does Corrections feel, and how do  
16 you feel about me going back there with defense counsel and  
17 the prosecutor to talk to him. Is that something that can be  
18 done, or it's not permitted? I don't know.

19 SERGEANT GELORMINO: Security wise. I mean he is  
20 behind bars, you're with me. The only thing I would ask,  
21 Judge, is that you don't stand directly in front of him in  
22 case he decides to spit which seems to be a very common thing  
23 that defendants do when they get this agitated.

24 THE COURT: Right. If we do that, then we'll come  
25 back into the courtroom and make a record in the courtroom of

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1 what happened in there because court reporter doesn't feel  
2 comfortable going.

3 (Pause in the proceedings)

4 THE COURT: Lieutenant, thank you for coming up we  
5 are discussing two possibilities. One is a force order, but  
6 I'm not entirely sure I see what the benefit of a force order  
7 would be. It would just -- I guess it would document his  
8 resistance but beyond documenting his resistance, I'm not  
9 sure that a force order would get us anywhere, anywhere  
10 productive.

11 The other possibility, and I don't know what the rules  
12 are about this with Corrections and with court security, but  
13 the possibility of me going in there with the defense counsel  
14 and the prosecutor just to talk to him and see if we can make  
15 a record when we come back in. Is that something that we can  
16 do?

17 LIEUTENANT MCKEE: We usually frown upon that only  
18 because you don't what he's going to do. If he gets angry  
19 have being angry spit at you. You don't know what he's going  
20 to do is there. Corrections will be there. I've seen it  
21 done. I've definitely seen it done. I would have to check,  
22 one, with them.

23 THE COURT: Would you mind checking with them.

24 LIEUTENANT MCKEE: I would like to speak to my  
25 captain because it's something usually we don't like to do

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1 because we want to make sure there are no safety issues,  
2 security issues but I will look into.

3 THE COURT: As always I defer to whatever you guys  
4 think.

5 LIEUTENANT McKEE: I will look into it right now.

6 THE COURT: Thank you. We'll wait. So the  
7 lieutenant is going to look into whether that is something  
8 that can be done for the three of us to go in there and talk  
9 to him. It's frowned upon I'm told. It's discouraged for  
10 obviously reasons, but they are going to look into it any  
11 way.

12 MR. HERLICH: I know I had this once before, Judge.  
13 It's been too long ago, so I don't remember the precise  
14 details, but I think the whole crew went to speak to the guy  
15 who was in the pens about some similar issue in a prior case,  
16 but if that is permissible under the Corrections rules, I  
17 would prefer that not this court reporter come if that makes  
18 her feel uncomfortable but if it's going to happen if we can  
19 get a court reporter that will feel comfortable, that's the  
20 best way to do it otherwise.

21 THE COURT: I don't think it critical that we have  
22 a court reporter. We can go in there. Do what we have to do  
23 and come back into the courtroom and make a record, and we  
24 can all make a record of what happened.

25 At this point the more I think about it the more I feel

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1 that a force order is not going to result in anything  
2 productive.

3 On the one hand, we can force him out here against his  
4 will, and he will, if that is the case, he is just to going  
5 to continue to be become a disruption, and I don't see how we  
6 can stop him or prevent him from doing that.

7 On the other hand, we try it execute the force order,  
8 people get hurt, and not just the defendant, but the court  
9 officers get hurt, and he doesn't come out. So I just don't  
10 see the benefit to that. I think right now, I'm much more  
11 inclined to just go back there and try to talk to him, but I  
12 think that all -- his behavior now and his insistence on  
13 doing this just further demonstrates why it's important that  
14 he remains shackled. Although he has not been violent today,  
15 he insists on doing things his ways, and he has definitely  
16 not deferred to the authority of the court officers up to  
17 this point. He has challenged their authority on several  
18 occasions, and again what was that language that he used,  
19 Sergeant?

20 SERGEANT GELORMINO: The statement in sum and  
21 substance was, "If I don't get out of here, I am going to  
22 spaz out and create a scene that will cause a mistrial."

23 THE COURT: All right. At this moment the  
24 lieutenant is checking with Corrections to see if it should  
25 be done.

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1 SERGEANT GELORMINO: Just for your information,  
2 Judge an Unusual Occurrence Report was filed which lead to  
3 the increase in the security level based on that statement.

4 THE COURT: So that was done last week?

5 SERGEANT GELORMINO: That was done on Thursday of  
6 last week.

7 THE COURT: Okay. I see.

8 SERGEANT GELORMINO: Basically we go progressive at  
9 that point, bunting, shackles and the link.

10 THE COURT: Again, I realize I made this record  
11 several times, but I feel it's important to make it again.  
12 He would not be handcuffed out here. He would be sitting at  
13 a table that has bunting all around it, and no one, no one in  
14 the courtroom will know he is wearing shackles, and when the  
15 time would come to testify, he would be escorted to the  
16 witness stand out of the presence of the jury. The jury  
17 would never see him walking in shackles. The jury would  
18 never have reason to know, believe, suspect, he in shackles  
19 because his hands would be free.

20 So he's just choosing to be obstructive at this point.

21 SERGEANT GELORMINO: The initial was going to be  
22 just leg shackles. Based on his temperament, okay, the full  
23 level of security which includes the D Belt. The D belt  
24 allows the hands to be in front of the body, but the wrists  
25 are actually handcuffed to the belt, so his hand would be

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1 handcuffed. They would be in front of the body. He wouldn't  
2 be rear cuffed. So he could actually hold things in his  
3 hands and hand them off to the lawyer, but the movement would  
4 be some what restricted.

5 THE COURT: Could he gesture if he wanted to with  
6 his hands?

7 SERGEANT GELORMINO: Above his midsection, no, and  
8 the reason --

9 MR. HERLICH: And his cuffs would be visible to the  
10 jury I assume, right?

11 SERGEANT GELORMINO: If he brought his hands up,  
12 yes.

13 THE COURT: But that is now -- that's where we are  
14 at now because of what has been happening this morning?

15 SERGEANT GELORMINO: Yes.

16 THE COURT: That wasn't the plan this morning?

17 SERGEANT GELORMINO: No. That was not the plan  
18 this morning. This morning, it was going to be initially  
19 just leg shackles to restrict his movement, but based on what  
20 we were met with, and then his refusal to come out period,  
21 even without the jury being present, the threat level was  
22 escalated.

23 THE COURT: Okay.

24 While we wait to hear back from the any lieutenant,  
25 would you like to go over the proposed jury charges?

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1 MR. HERLICH: Yes.

2 THE COURT: Are there any exceptions or requests?

3 MR. HERLICH: Two requests, Your Honor. With  
4 regard to the credibility of witnesses, I observed that there  
5 is the classic instructions on prior inconsistent statements.

6 As I indicated, I think on Friday I did attempt to  
7 impeach the witness by -- the complaining witness by  
8 omission. In that she did not tell Detective Barbato certain  
9 things that occurred during the course of the alleged crime  
10 that she testify to at trial, and so I would request that the  
11 jury may, for credibility purposes, consider impeachment by  
12 omission.

13 The other thing that occurred to me --

14 THE COURT: Sorry. Let me just -- People would you  
15 like to be heard on that?

16 MS. PARK: No.

17 MR. HERLICH: The other issue, Your Honor and, I'm  
18 not a hundred percent sure it would cover attempted rape in  
19 the first degree. I'm still -- I think, Judge, will you make  
20 a ruling before the summation as far as the motion to dismiss  
21 based at the close of the People's case, or would you  
22 reserve?

23 THE COURT: Yes. This is regarding your  
24 application that the several charges were multiplicitous and  
25 count five should be dismissed?

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1 MR. HERLICH: And count three, attempted rape  
2 should be dismissed.

3 THE COURT: Okay. First of all, I believe that  
4 Judge Solomon ruled on this already, and I believe that is  
5 the law of the case, however, even if it were not the law of  
6 the case after reviewing the papers and considering the  
7 research that has been done, I agree with Judge Solomon that  
8 the counts are not multiplicitous and count five should not  
9 be dismissed. Hold on a second.

10 (Pause in proceedings)

11 THE COURT: If your client does not testify, I take  
12 it we need to make a correction, or a change to the section  
13 on interested and lack of interest?

14 MR. HERLICH: Yes, as well as impeachment by  
15 criminal history. It really wouldn't apply in this case.

16 THE COURT: Yes. Anything else?

17 MR. HERLICH: Yes, Judge, the one think I thought  
18 of was a jury instruction on -- I think it's called  
19 abandonment with -- regard to the count of attempted rape in  
20 the first degree. If you credit completely the testimony of  
21 the complaining witness, she admitted that when she said  
22 stop, he complied with her request.

23 So my request would be that the defendant, if he ever  
24 intended to commit that crime, he abandoned that plan or that  
25 intent and did not commit the crime. The question is does

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1 abandonment would that cover attempted rape in the first  
2 degree. I think that is a close question, but that is my  
3 request that he abandoned his plans to commit that crime.

4 THE COURT: People?

5 MS. PARK: Judge, I'm not really sure what charge  
6 Mr. Herlich is referring to, but if he wants to argue that he  
7 can. I don't think the jury needs a special instructions on  
8 his plan of abandonment, but by the time that he rubbed his  
9 penis against her vagina, our position is the crime of  
10 attempted rape in the first degree has been satisfied. We  
11 didn't charge him with a complete rape.

12 THE COURT: Well, and he didn't just abandon it  
13 because she asked him not to. She said it hurt he was trying  
14 to talk her into it by telling her if she relaxed, it  
15 wouldn't hurt, and there was, as I call some evidence about  
16 that type of conversation, if you can call it conversation,  
17 going back and forth at that time. Nonetheless, let me look  
18 into the standard charge on that before I rule on it.

19 MR. HERLICH: Okay.

20 THE COURT: People, anything on the charges?

21 MS. PARK: No, Your Honor.

22 THE COURT: So just to go over what the changes  
23 would need to be if he does not testify, revise the interest  
24 lack of interest, revise the previous criminal conduct, and  
25 add the section on omissions. Right.

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1 MR. HERLICH: Oh, based on my request?

2 THE COURT: Yes.

3 MR. HERLICH: Yes, yes.

4 SERGEANT GELORMINO: Judge, I just spoke with  
5 Captain Garele from Corrections. Whenever you're ready,  
6 we'll put it into motion.

7 THE COURT: Okay. Let's just go in there.

8 (The Court, defense counsel and the prosecutor  
9 proceeded to the pens to speak with the defendant)

10 (Proceedings later resumed's in open court)

11 THE COURT: It's now 11:30. I was permitted to go  
12 into the pens where I tried to engage Mr. Harrell in a  
13 reasonable conversation for about 10, maybe 15 minutes. We  
14 did talk. He was agitated. I was just trying my hardest to  
15 convince him that I just wanted him to have a fair trial and  
16 I want to preserve his right to testify, and I tried to  
17 communicate that to him I don't know how many different ways,  
18 but he is hung up on the fact that he feels that -- these are  
19 my words not his, but he feels that he was disrespected on  
20 Thursday. That I was the reason he was agitated, and,  
21 therefore, I assume he was kidding, but the Court Officer  
22 should have restrained me and not him. I did ask him at that  
23 point about an anecdote I learned of while I was in the  
24 hallway that he turned to one of the court officers last week  
25 on Thursday and said, "Do you have to stand so close to me?"

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1 I can feel your body. Get away. You're too close. I can  
2 feel you breathing."

3 So again he was trying to tell the court officers how to  
4 do their jobs. I was not even aware of that anecdote.

5 COURT OFFICER: That was Wednesday.

6 THE COURT: That was Wednesday the day before  
7 anything even happen. We were joined by a Captain from  
8 Corrections who, in my opinion, did a terrific job of  
9 communicating with the defendant. I would ask the Captain if  
10 you wouldn't mind making a record of what your dialogue was  
11 with him?

12 CAPTAIN GARELE: I'm Captain's Garele, Shield No.  
13 133, and Mr. Harrell adamantly refuses to appear in the  
14 courtroom. The judge as well as the OCA sergeant tried  
15 numerous time to get him to comply which he's still refusing  
16 to appear in the courtroom.

17 MR. HERLICH: Shackled.

18 THE COURT: Shackled.

19 MR. HERLICH: That's the whole beef.

20 THE COURT: Yeah. He does not want to come out in  
21 shackles. I explained to him over and over again how we  
22 would do it. How we would try to make this happen so that he  
23 is not prejudiced in any way so that the trial is not tainted  
24 in any way, and he was just not having any part of it. He  
25 refuses to come into the courtroom shackled.

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1 Thank you. Thank you, Captain. I appreciate it.

2 CAPTAIN GARELE: Thank you.

3 THE COURT: Mr. Herlich, Ms. Park, you were in  
4 there as well. Anything you want it add to the record?

5 MR. HERLICH: I will just say, you know, to  
6 paraphrase the defendant, "I want to testify at trial, but I  
7 refuse to come to the courtroom if my legs are shackled."  
8 Even though I explained to him and so did many other people  
9 this morning that while he's in the witness stand, the jury  
10 would not be able to even observe that his legs are shackled  
11 so that is his position and he is not willing to compromise  
12 on it.

13 THE COURT: Ms. Park?

14 MR. HERLICH: Nothing else except just the record  
15 is clear that his tone that he was speaking loudly. He seem  
16 very upset.

17 THE COURT: Yes. He was agitated. He cut me off a  
18 number of times. Communication with him was not easy, and  
19 although I'm sure that other judges have done what I did,  
20 it's not everyday that a judge will go into the pens to speak  
21 to an incarcerated defendant.

22 I did that because I genuinely just want him to have his  
23 day in court if he wants to testify. I was trying to do  
24 everything within my power to find a way to make that happen,  
25 but there was no compromising with him. His feeling was no

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1 shackles period.

2 I explained to him that this is a serious case. He's  
3 looking at significant jail time, that it would be in his  
4 best interest for the jury to hear his story, if that's what  
5 wants to do. I told him that I felt that he was being a bit  
6 foolish, that he was cutting off his nose to spite face, that  
7 he was standing on principal here. I personally apologized  
8 for anything I said and did on Thursday to upset him or to in  
9 any way create the environment that ultimately resulted in  
10 his leaving.

11 I reminded him that he asked to be excused Thursday and  
12 we complied. He was excused. I reminded him that he asked  
13 for trial to not continue on Friday because of his religious  
14 observance, and I did that. The trial not continue on  
15 Friday. There is just nothing else I can do at this point  
16 it's. Now 11:35. I imagine most of the jurors are back.

17 So Mr. Herlich I will hear you now on how we should  
18 proceed.

19 MR. HERLICH: Given what has transpired, Judge, I  
20 would like to move in front of the jury one piece of evidence  
21 into evidence regarding the defendant's phone call history of  
22 his phone records, and then I would rest and go into closing  
23 arguments?

24 THE COURT: And how are you going to lay the  
25 foundation for those phone records?

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1 MR. HERLICH: I don't believe the prosecutor is  
2 objecting to them. Part of them -- I believe part of those  
3 records are in evidence from certain dates. I was going to  
4 move in the entire record from February 6th, I believe, until  
5 July 16, 2014.

6 THE COURT: Okay? People, anything else you would  
7 like to add at this point.

8 MR. HERLICH: Just one second, Your Honor.  
9 (Defense counsel in discussion with the prosecutor)

10 MS. PARK: Judge, just a couple of things. I just  
11 wanted the record to be clear that the defendant was told  
12 that the trial will proceed if he refuses to come out in his  
13 absence.

14 THE COURT: Right.

15 MS. PARK: Also I just wanted to file with the  
16 Court an updated Rosario list. Last week I neglected to move  
17 in People exhibit 17A. I told Mr. Herlich, and I don't think  
18 he's going to object to it. When People's 17 came in, 17A  
19 should have come in. It's a photograph of the broken glass.

20 THE COURT: Any objection to any of that?

21 MR. HERLICH: No.

22 THE COURT: So you will introduce some phone  
23 records. You are going to introduce that. Before we  
24 continue. Just on the -- we called it abandonment, but it's  
25 really renunciation.

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1           So I direct to your Penal Law section 40.10 (3). "In  
2 any prosecution pursuant to Section 110.00 for an attempt to  
3 commit a crime, it is an affirmative defense that under  
4 circumstance manifesting a voluntary and complete  
5 renunciation of his criminal purpose, that defendant avoided  
6 the commission of the crime attempted by abandoning his  
7 criminal efforts, and if mere abandonment was insufficient to  
8 accomplish some a avoidance by taking further and affirmative  
9 steps which prevented the commission thereof."

10           I think that in looking at the evidence that was  
11 presented at this trial, it's difficult to say that the  
12 evidence supports this instruction of renunciation under  
13 Subsection (3). Again the subsection requires a voluntary  
14 and complete renunciation of his criminal purpose.

15           So we are dealing obviously in that count just with the  
16 attempted rape, but I don't think that it can be said that he  
17 abandoned his complete criminal purpose. What he did from  
18 that when that didn't work, he then moved on to a different  
19 sexual act which was the oral sex, and he actually completed  
20 that act. He actually ejaculated and then used the victim's  
21 underwear to clean up afterwards. I don't believe that this  
22 is an appropriate charge in this case.

23           All right. So I guess what we are going to do now is go  
24 to summations. I will give the jury a brief three-minute  
25 instruction on what summations are, and then you can delivery

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1 your summations.

2 MR. HERLICH: Can I have one minute, Judge?

3 THE COURT: Sure.

4 COURT OFFICER: Judge, jurors number one,  
5 Mr. Alexander, and No. five, Mr. Morais wish to address. One  
6 is about his pay and his job, and the other one wants to  
7 speak to you about a sermon I believe.

8 THE COURT: A what?

9 COURT OFFICER: A sermon. He said he was supposed  
10 to do it Sunday and they moved it to Wednesday, but at 1:30.

11 THE COURT: Let's bring them in. Would you mind  
12 waiting let's bring in juror number one, and then juror  
13 number five.

14 (Juror enters)

15 THE COURT: Good morning, sir how are you. It's  
16 my understand you wanted to speak to us.

17 JUROR: Yes.

18 THE COURT: Go ahead.

19 JUROR: I was scheduled Sunday because this is  
20 Laymen's week at our church to teach the congregation. I  
21 found out yesterday that they scheduled me for 1:30 on  
22 Wednesday.

23 THE COURT: Okay.

24 JUROR: I didn't know -- I didn't know whether or  
25 not that was something I needed to tell you, and if I would

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1 be able to be excused for that day, and if not I just need to  
2 know so that I can make a phone call.

3 THE COURT: Yes. First of all, thank you for bring  
4 this to our attention, and I apologize for the disruption to  
5 your life during these proceedings.

6 At this point I don't know whether the jury is going to  
7 be done with it's deliberations by Wednesday at 1:30, and  
8 once a deliberating jury -- once a jury begins it's  
9 deliberations, it's -- we can't just take time off. You  
10 know, we can't just take days off or afternoons off. At that  
11 point it becomes very, very difficult to replace a  
12 deliberating juror with an alternate juror.

13 What I can tell you is I expect we're going to continue  
14 this morning with the summation, so I expect that the jury  
15 will get the case to begin it's deliberations no later than  
16 this afternoon. Sorry I can't give you a better answer than  
17 that.

18 JUROR: Thank you, sir.

19 (Juror No. 1 exits. Juror No. 5 enters)

20 THE COURT: Good afternoon sir. I understand you  
21 want to speak to us.

22 JUROR: Sure. So my company just made me aware  
23 that they're only going to pay for my first 10 days of jury  
24 duty, and then afterwards they will not cover me. So it may  
25 be, you know, with the State only paying me like \$40, it may

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1 be a financial hardship so-to-speak because I'm not going to  
2 be getting paid when I'm accustomed to paying.

3 So I know we obviously made a lot progress. I already  
4 used six of my days. I just wanted to advise you of that.  
5 Thank you.

6 THE COURT: I appreciate that. Is today your  
7 seventh day?

8 JUROR: Today would be my seventh, correct.

9 THE COURT: So you could work through Thursday, if  
10 necessary without that being a problems?

11 JUROR: Right.

12 THE COURT: You know, it's very difficult for me to  
13 know in advance how long a jury is going to deliberate. I've  
14 had juries deliberate for 15 minutes. I've had juries  
15 deliberate for a week. What I can tell you is that I expect  
16 that the jury will receive the case and begin it's  
17 deliberations this afternoon. So if you can put this concern  
18 out of your mind and deliberate and not be distracted, I  
19 think we're doing okay on time as far as the 10 days.

20 JUROR: Definitely. It was just one of those  
21 things I spoke with the jury clerk, and she advised me to  
22 advise you rather to cover my basis.

23 THE COURT: Okay, and you think you can put that  
24 aside and just focus on your deliberations?

25 JUROR: Absolutely.

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1 THE COURT: Thank you for bring that to my  
2 attention.

3 JUROR: Absolutely.

4 THE COURT: You can step out. Thank you.

5 (Juror exits)

6 THE COURT: Mr. Herlich, would you like me to give  
7 the jury that instruction again that they are not to drawn  
8 any inference against the defendant, or is it sufficient that  
9 I gave it once?

10 MR. HERLICH: I think it's sufficient that you gave  
11 it once, Your Honor.

12 THE COURT: Okay. Let's bring the jurors in  
13 please.

14 By the way the verdict sheet has been prepared. I  
15 believe the prosecutor has initialed it. Mr. Herlich, can  
16 you take a look at it, and if you approve, please initial it  
17 as well.

18 MR. HERLICH: Just one thing with regard to count  
19 six and seven 7D, is it necessary to put in that the  
20 defendant was older than 21 years old.

21 THE COURT: Let me take a look.

22 (Pause in the proceedings)

23 THE COURT: Well, that's an element of the offense,  
24 and actual in six and seven, we don't put the defendant's  
25 age. We only put the victim's age. Am I not reading --

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1 MR. HERLICH: No, no. I am wondering if it's  
2 necessary to.

3 THE COURT: I thought you were questioning.

4 MR. HERLICH: No. Not at all. Not that you put  
5 that the age of the victim is under a certain age, but that  
6 they must also find that the defendant's age, I believe, has  
7 to be 21 or older.

8 THE COURT: Well, that is an element of the  
9 offense, and if you want us to add that, we can.

10 MR. HERLICH: Okay.

11 THE COURT: So we'll add and the defendant was over  
12 21 years of age. Ms. Park any observation to that?

13 MR. HERLICH: No.

14 THE COURT: So we'll make those changes, and we'll  
15 continue now with the jurors. So I will allow you to  
16 introduce 17A first, and then I will turn to you, Mr. Herlich  
17 People, how long do you expect to be?

18 MS. PARK: I think 45 minutes.

19 THE COURT: Mr. Herlich how long do you expect  
20 yours to be?

21 MR. HERLICH: Not very long, Your Honor.

22 THE COURT: Panel entering. All rise.

23 THE CLERK: Case on trial People vs. Lonnie  
24 Harrell. All parties are present except the defendant, and  
25 the jurors are present.

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1 THE COURT: Good morning, Jurors. Welcome back. I  
2 hope you had a good weekend. I apologize for the delay this  
3 morning. I know that you were here and you were ready to go,  
4 so I apologize for keeping you waiting, but at this time we  
5 are ready to continue.

6 People, do you wanted to introduce 17A?

7 MS. PARK: Yes, at this time the People are moving  
8 in People Exhibit 17A connection having been made.

9 THE COURT: And there is no objection to that,  
10 right?

11 MR. HERLICH: Correct.

12 THE COURT: People's 17A is accepted into evidence  
13 finding that the connection has been fully made, and you now  
14 rests?

15 MS. PARK: Yes.

16 THE COURT: Okay. Mr. Herlich.

17 MR. HERLICH: Your, Honor the defense would like to  
18 move into evidence the phone calls, the phone records of the  
19 defendant from of February 6, 2014 to July 16, 2014.

20 THE COURT: Any objection?

21 MS. PARK: No, Your Honor?

22 THE COURT: That will be defense? What are we up  
23 to?

24 THE CLERK: F.

25 THE COURT: Defense F. Do you now rest?

**Analia Hudson, SCR**

**PRELIMINARY INSTRUCTIONS**

1 MR. HERLICH: Yes.

2 THE COURT: Thank you please have a seat.

3 Members of the jury, you will now hear the summations of  
4 the lawyers. Following the summations I will instruct you on  
5 the law, and then you will begin your deliberations.

6 Under our law, the defense counsel must sum up first and  
7 the prosecutor must follow. The lawyers may not speak to you  
8 after that.

9 Provide each lawyer an opportunity to the review the  
10 evidence and submit for your consideration the facts,  
11 inferences, and conclusions that they contend may properly be  
12 drawn from the evidence.

13 If you find that a lawyer has accurately summarized and  
14 analyzed the evidence, and if you find that the inferences  
15 and conclusions the lawyers asks you to draw from that  
16 evidence are reasonable logical and consistent with the  
17 evidence, then you may a adopt those inferences and  
18 conclusions.

19 Members of the jury please bear in mind the following  
20 points. First, you are the finders of fact, and it is for  
21 you to determine the facts from the evidence that you find to  
22 be truthful and accurate. Thus, whatever the lawyers say and  
23 however they say it, you should remember what the lawyers say  
24 is simply argument submitted for your consideration.

25 Second, remember the lawyers are not witnesses in this

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**PRELIMINARY INSTRUCTIONS**

1 case. So if a lawyer asserts as fact something that is not  
2 the based on the evidence, you must disregard it. Remember  
3 nothing the lawyers say at any time is evidence. So nothing  
4 the lawyers say in their summations is evidence. You have  
5 heard the evidence and must decide this case on the evidence  
6 as you find it and the law as I explain it.

7 Third, during the summations one lawyer's recollection  
8 of the evidence may in good faith differ from the  
9 recollection of the other lawyer or from your own  
10 recollection, and the lawyers will undoubtedly differ with  
11 each other on the conclusion to be drawn from the evidence.  
12 It is your own recollection, understanding, and evaluation of  
13 the evidence, however, that controls regardless of what the  
14 lawyers have said or will say about the evidence.

15 If during your deliberations you need to have your  
16 recollection of the testimony refreshed, you may have all or  
17 any portion of the testimony read back to you.

18 Four, remember under our law, I'm responsible for  
19 explaining the law. Not the lawyers. If you think there is  
20 any difference between what the lawyers may have said or what  
21 I say the law is, your sworn duties as jurors is to follow my  
22 construction on the law as you have promise you would.

23 And fifth, if during the summations I sustain an  
24 objection to a comment of a lawyer, that comment will be  
25 stricken from the record, and you must disregard it as it

**HERLICH - CLOSING**

1 were never said. If I overrule an objection the comment will  
2 stand. Whether I sustain or overrule an objection, or on my  
3 own indicate a comment must be disregarded, my ruling  
4 indicates only that the comment does or does not violate one  
5 of the rules of law set down for lawyers to follow during a  
6 summation.

7 It is not an attempt to indicate that I have an opinion  
8 on what is said, or of the facts of the case, or if whether  
9 the defendant is guilty or guilty. Remember under our law  
10 you alone judge what facts, if any, are proven and whether  
11 the defendant is guilty or not guilty. Not I and not the  
12 lawyers.

13 We turn now to the summations, Mr. Herlich.

14 MR. HERLICH: Let we begin by reminding you that  
15 during voir dire I did mentioned to you that if Mr. Harrell  
16 does not testify you can't hold that against him, and I just  
17 want to remind you of that at this time.

18 You may have noticed, I assume, that I just moved into  
19 evidence phone records of Mr. Harrell that go from February  
20 of 2014 to July 16, 2014, and I just want to briefly go  
21 through some of this to just show you that Mr. Harrell,  
22 consistent with testimony of both Laketa Smith and Cypress  
23 Smith, was sort of a family friend.

24 On April 22, 2014, there were a total of eight text  
25 messages between Mr. Harrell's phone the number ending in

**HERLICH - CLOSING**

1 from 3203, and Laketa Smith's phone ending in 7475, and I  
2 will just go through it very you quickly.

3 On that date April 22 at 2:05 p.m. there was an outgoing  
4 text from Mr. Harrell to Laketa Smith, and at 2:22 there was  
5 an incoming text from Smith to the defendant. Then at 2:50  
6 p.m., there was an outgoing text from Harrell to Laketa. At  
7 2:52 there was another outgoing text from the defendant to  
8 Laketa Smith. At 2:53 Laketa Smith sent a text to the  
9 defendant. At 2:59 p.m. there was the text of the defendant  
10 to Laketa Smith. Another text only seconds later also at  
11 2:59 p.m. from defendant to Laketa Smith, and last, and that  
12 was it for -- Sorry. One more. There was an incoming text  
13 from Laketa Smith to the defendant at 3:08 p.m.

14 Then on April 27, there was an outgoing voice call from  
15 the defendant to Laketa Smith at 1:04 p.m. It was a 44  
16 second call. On June 23, 2014 there was a incoming voice  
17 call from Laketa Smith to the defendant at 2:36 p.m. It  
18 lasted 37 seconds. On June 24th, there was an incoming call  
19 from Laketa Smith to the defendant at 1:15 p.m. That lasted  
20 seconds, and on the same date June 24, 2014 there was an  
21 outgoing voice call from the defendant to Laketa Smith at  
22 1:17 p.m. that lasted 72 seconds.

23 Again on the same date June 24, 2014, Laketa Smith  
24 called the defendant at 1:23 p.m. That call lasted 67  
25 seconds, and on June 25, 2014 it was an outgoing call from

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1 the defendant to Laketa Smith at 10:42 a.m. That is on  
2 June 25 for 75 seconds.

3 On July 6, 2014 there was an incoming call, voice call  
4 from Laketa Smith to the defendant at 3:39 p.m. that lasted  
5 one minute and 54 seconds, and lastly on the same day July 6,  
6 2014, there was an outgoing call from the defendant to Laketa  
7 Smith at 7:11 p.m., and that lasted 16 seconds.

8 And this is just to demonstrate that there was a cordial  
9 relationship between the defendant and Ms. Laketa Smith and  
10 her daughter. The phone communications were between mother  
11 and Mr. Harrell, and perhaps that's the only part of this  
12 case where there is consistent testimony regarding the fact  
13 that prior to July 16, 2014 Mr. Harrell was a friend of the  
14 family, and the communications make sense in the context of  
15 the friendship between Lonnie Harrell and Journey who was and  
16 is Ms. Smith's son, and as you heard Mr. Harrell took Journey  
17 to play basketball and ride bikes, and so they had a  
18 relationship, so it's only natural that mother and Mr.  
19 Harrell had some way of communicating with each other.

20 Let me address the testimony of Cypress Smith who is the  
21 complaining witness in this case. The Judge will instruct  
22 you at the end of the case on what tools you can use to  
23 assess the credibility of a witness, and one of the tools is  
24 called impeachment by omission.

25 In other words what I attempted to do during cross

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1 examination was to ask Laketa Smith -- I am sorry -- Cypress  
2 Smith about the fact that she left out some information about  
3 the events of July 16, 2014, and for you to consider the fact  
4 that she had left out certain events from her narrative that  
5 she gave to Detective Susan Barbato at St. Luke's Roosevelt  
6 Hospital during the period of time that she was in the  
7 hospital from approximately 3:40 -- some time after 3 p.m.  
8 until shortly after midnight on July 17th, and the medical  
9 records will also bear out that at some time during the  
10 course of her being at the hospital, she similarly gave a  
11 narrative that left out a certain portion of the event that  
12 she did recall at trial.

13 So I want to focus on the testimony of Cypress Smith  
14 that deals with the charge of attempted rape in the first  
15 degree which is the third count of the indictment that you  
16 will have to consider in this case.

17 Cypress Smith testified about how she let Mr. Harrell  
18 into her house because he was a family friend, and they had a  
19 smoothie together, and when she gets into the sexual contact  
20 that took place between the two parties, she indicated at  
21 first that he kissed her, and by her testimony it was by  
22 force; that he also put, she believed two fingers into her  
23 vagina, and after testifying about Mr. Harrell allegedly  
24 putting two fingers into her vagina this is what she said.  
25 Starting at the bottom of Page 63 of the trial transcript



**HERLICH - CLOSING**

1 Line 24:

2 "Q So what happened next?

3 "A Then he put his mouth on my vagina and his  
4 tongue. I kept telling him stop. He kept saying that I  
5 like it and that I wanted this, and if I say, "No, I didn't  
6 he would say, "Yes, You did.

7 "Q What do you mean?

8 "A If I say, "Stop." He would say, "You wanted  
9 this. I would -- and I said, "No, I didn't, and he said,  
10 "Yes, you did want it. I said, "No, I didn't, and he said,  
11 "Yes, you did again."

12 So the point of me reviewing that part of the testimony  
13 is to show that Ms. Cypress Smith indicated that she first  
14 had experienced actually being kissed then having Mr. Harrell  
15 put two fingers into her vagina, and then his mouth on her  
16 vagina. Then the prosecutor directed a question to her  
17 because she left something out of the narrative. At least in  
18 the sequence that the prosecution has presented for your  
19 consideration. They're going to claim it happened in a  
20 certain linear sequence, and on a number of occasions  
21 Ms. Smith consistently left out certain portions or got the  
22 order of things mixed up.

23 So the question was, "Before he put his mouth on your  
24 vagina, did anything else happen?

25 "A He took out his penis, and he rubbed it against

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1 me.

2 So she had to be prompted to recall the penis to the  
3 vagina content.

4 "Q He rubbed it against you where?

5 "A On my vagina, and I asked him not -- I asked him  
6 not to put it in because it would hurt. He said, it won't  
7 hurt if you relax again.

8 "Q Did his penis touch your vagina?

9 "A Yes.

10 "Q Did his penis go into your vagina.

11 "A No."

12 So let me just remind you that when I examined Susan  
13 Barbato, the detective from Special victims who interview  
14 Cypress Smith at the hospital I asked the detective to review  
15 the paperwork of an exhibit for the purposes of  
16 identification to review it without reading it out loud, and  
17 then I asked her, "Isn't it a fact that Cypress Smith never  
18 mentioned to you any type of contact between penis and  
19 vagina." And she said, "Yes, that wasn't mentioned to me."  
20 And I believe on redirect the prosecutor asked her "Well, you  
21 just took a narrative statement from her. You didn't --  
22 meaning that you didn't question her step by step about every  
23 detail. You just took a narrative, and that was left out?"

24 So you can consider that when you assess the credibility  
25 of the witness. That portion of allege sexual assault wasn't

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1 mentioned to the Detective Barbato, and it will appear in the  
2 medical records.

3 There is a number of things I want to discuss with you.  
4 First, I want to stay on point regarding what the complaining  
5 witness didn't say at certain times in the medical records.  
6 Okay. There is -- in the medical record there is a  
7 pre-hospital care report summary which apparently is prepared  
8 by the hospital. Not the hospital the E.M.T.s the ambulance  
9 guys or gals who transported Cypress Smith to the hospital,  
10 and they took information from her before she was handed off  
11 to treatment at the hospital, and on Page 2 of the  
12 pre-hospital care report summary that is in evidence, they  
13 took a narrative from the complaining witness that goes  
14 through a great deal of what Ms. Smith said at trial, and I  
15 can read it to you quickly:

16 "Fifteen-year old female, alert an oriented times three  
17 again POS, is that positive, or is that possible, I Don't  
18 Know. POS ABC negative SOB. SOB is shortness of breath.  
19 Raped by adult male --

20 Again the Judge will instruct you on definitions of all  
21 of the crimes in this case. The defendant is not charged  
22 with rape, but that is what was written down -- by a male  
23 known to her from the building she lives. Patient states she  
24 was forced by a male to perform oral sex on him and forcibly  
25 performed oral on the victim.

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1 Patient states the patient -- I guess it means  
2 perpetrator choked her, pulled her pants down, placed her on  
3 a stool. Performed oral sex on the victim. Forced her to  
4 her knees and instructed the victim to perform oral sex on  
5 him.

6 Patient states she thinks the male ejaculated in her  
7 mouth, but she is not sure is. Patient is complaining of  
8 pain to the right side of the neck, POS either positive or  
9 possible redness to the right side of the neck. Denies lost  
10 of the consciousness. Denies neck and back pain. Denies  
11 chest pain."

12 That narrative does not indicate any contact between the  
13 defendant's penis and the complaining witness's vagina, and  
14 in one other portion of the medical records is an area of the  
15 report entitled Pages 1 through 6, and on Page 4 of 6 there  
16 is another narrative section where there is a note. I  
17 believe from looking at the records the note was prepared by  
18 a registered nurse, and the note says:

19 "Patient let neighbor in who is a friend of her brother.  
20 Upon leaving assailant gave her a hug but wouldn't let go.  
21 Forced her into chair. Performed oral sex with her. Then  
22 made her perform oral sex on him with him ejaculating in her  
23 mouth. No vaginal penetration with penis. Used fingers  
24 only. Presently with mother and police officer calm but  
25 slightly teary. Several scratches noted to her right cheek.

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1 States he was choking her."

2 (Proceedings continued next page)

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1 MR. HERLICH: So, that narrative, again, is a  
2 second narrative in the medical record where the patient  
3 failed to disclose that there was any contact between  
4 defendant's penis and the complaining witness' vagina.

5 And I'm only submitting that to you as an omission  
6 to consider the credibility of the witness who -- who  
7 omitted twice in the medical records and two interviewers  
8 and to Detective Barbato that she didn't mention that part  
9 of it. So that's something to consider whether anything of  
10 that nature actually took place or not.

11 Now, let me discuss the count of attempted rape in  
12 the first degree. I already read you the complaining  
13 witness' testimony on that. I just want to read you the  
14 cross-examination. I mean, I hope you remember, and I don't  
15 know if you can see from your position in the jury box, but  
16 when I was questioning Cypress Smith, I was using my hands  
17 because she had testified that he rubbed his penis against  
18 her vagina.

19 And I said to her -- I asked her: Was it like  
20 this, meaning like penis against vagina like this, or was he  
21 trying to insert his penis into her vagina. I wanted her to  
22 be very clear about that. And this is what I asked her,  
23 from page 90 at the bottom going forward:

24 "Question: Now, you indicated during your direct  
25 testimony that Mr. Harrell's penis had -- he rubbed his

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1 penis against your vagina. Did you see that or you just  
2 felt the event?

3 "Answer: I saw it.

4 "Question: And to the extent I am able to  
5 demonstrate, was Mr. Harrell's penis rubbing against your  
6 vagina as I am demonstrating with my hands, or was it in a  
7 way where he was trying to insert his penis into your  
8 vagina?

9 "Answer: The first demonstration, and then as he  
10 moved to -- as it seemed like he was trying to insert his  
11 penis into my vagina, I asked him to stop.

12 "Question: And when you asked him to stop, in  
13 fact he did stop, isn't that fair to say?

14 "Answer: Yes."

15 So, if you fully credit the testimony of the  
16 complaining witness, my argument to you at the end of the  
17 case is that while there may have been penis to vagina  
18 contact by the defendant going like this and she  
19 acknowledged that by saying yes, the first demonstration,  
20 meaning penis rubbing against vagina, I will repeat her  
21 words: "Then as he moved to -- as it seemed like he was  
22 trying to insert his penis into my vagina, I asked him to  
23 stop."

24 So, it wasn't clear to me from her answer how far,  
25 if at all, he got in doing any type of penis to vaginal

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1 contact which was directed or aimed at inserting his penis  
2 in her vagina, but as soon as she asked him to stop, he --  
3 unlike with regard to her testimony about every other act  
4 that's alleged in the indictment, as to this particular act,  
5 he -- he honored her request and did not try to use forcible  
6 compulsion to have his penis inserted into her vagina.

7 So, based on that, I would ask that you return a  
8 verdict of not guilty as to attempted rape in the first  
9 degree even if you fully credit her testimony regarding  
10 everything that happened in this case.

11 Let me just go through some other things in the  
12 medical record that you will have an opportunity to review,  
13 it's in evidence and you can review it in the jury room.

14 I believe when the complaining witness first comes  
15 to the hospital, she did complain of pain. I believe on  
16 page three of six of the hospital record, on page three of  
17 six, she tells a nurse: Patient states man also choked her  
18 and her throat hurts.

19 So, in the hospital record as distinct from the  
20 ambulance record, as I already read, she complained of  
21 possible pain to the right side of her neck. In the  
22 hospital record, the complaint is about a sore throat, and  
23 the pain six. On a scale of zero to ten, the pain was six.  
24 And that was at 3:40 p.m., the pain at 9:28 p.m. was one out  
25 of ten and shortly thereafter at -- prior to her discharge,

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1 it was zero out of ten. So, the sore throat pain that was  
2 complained of initially had abated completely by the time  
3 she was discharged.

4 May I see the photographs?

5 (Counsel conferring with counsel.)

6 MR. HERLICH: Okay, on the part of the medical  
7 record that is entitled pages one through seven -- one of  
8 seven -- going to page one, there is an indication that  
9 right cheek abrasion with a scratch.

10 Okay, with regard to genital exam, no lesions  
11 noted. No injuries to her vaginal area. This is from the  
12 comprehensive sexual assault assessment form which is one  
13 through six of.

14 On page three, again it says abrasion to right  
15 cheek, otherwise well appearing. Abrasion, scratch on right  
16 cheek. I think it's in the ambulance report again where --  
17 on the ambulance report, as I indicated, complains of pain  
18 to right side of neck, possible redness to the right side of  
19 the neck.

20 So here's a photograph taken at the hospital  
21 regarding Cypress Smith's right cheek. I mean, you're the  
22 jurors, you'll decide what it shows. It's hard for me to  
23 say what it shows. I don't know if it indicates a scratch  
24 or some area of redness on her right cheek. It appears to  
25 me that there's absolutely no redness on the right side of

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1 her neck which was mentioned in the ambulance report.

2 Now, when Dr. Singh testified, and let me just  
3 give you the comprehensive sexual assault assessment form  
4 narrative. It is a little hard to read, but it says:

5 Patient was making Smoothie. Allowed neighbor in  
6 who asked for Smoothie that patient was making. Patient was  
7 threatened by neighbor. Neighbor then asked patient to  
8 undress. Neighbor asked patient to perform oral sex on him  
9 and then neighbor performed oral sex on patient. Penis  
10 contacted vagina, no penetration. Neighbor ejaculated  
11 during oral sex. No penetration on exam or ejaculation.

12 So, in this narrative in the comprehensive sexual  
13 assault assessment form the complaining witness does mention  
14 that there was penis to vagina contact. And that's the only  
15 place in the report that that's mentioned. In the other two  
16 narrative parts of the hospital record, it was left out.

17 But Dr. Singh, who came into the hospital  
18 approximately 7:00 p.m., is when she came into contact with  
19 the complaining witness in this case, and she testified:  
20 Before my arrival, the intern who was working with me  
21 conducted the original physical examination of the  
22 complaining witness and the physical examination of the  
23 complaining witness, in Dr. Singh's own words, is a  
24 head-to-toe examination, and in this head-to-toe examination  
25 conducted by Dr. Singh's intern, there was no indication of

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1 any kind of injury, scratch, abrasion to the back of Cypress  
2 Smith's neck.

3 Now, as Cypress Smith then -- there's one little,  
4 maybe not so little inconsistency, between the testimony of  
5 Cypress Smith and her mom. When I asked Cypress Smith about  
6 the scratch on the back of her neck, she -- I asked her: Do  
7 you know -- your mom took that photograph, do you know when  
8 your mom took the photo. She said at the hospital. And I  
9 said: Was this during your initial visit to the hospital  
10 or, you know, the follow-up. She said during the initial  
11 visit, which isn't what mom said.

12 Mom said -- on the next day mom indicated --  
13 that's Laketa Smith -- indicated that there were two  
14 appointments. There was one appointment where she went for  
15 a medical examination or a medical follow-up, and that, by  
16 the medical record itself from Spencer Cox Center For  
17 Health, indicates that it took place at approximately -- the  
18 medical --

19 I'm sorry, the social worker appointment was  
20 first, and the social worker met with Laketa Smith and  
21 Cypress Smith at approximately 1:31 p.m. and she took a  
22 narrative, a brief narrative, of the events of July 16th.  
23 This was the next day, July 17th, two-thirty-one in the  
24 afternoon, and that's where it says: Patient reports she's  
25 feeling okay about the incident. No particular concerns

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1 reported or noted.

2 And apparently, according to mom's testimony, they  
3 left, they had lunch somewhere, they came back for the  
4 medical follow-up at approximately five-twenty-three in the  
5 afternoon at the Spencer Cox Center For Health, which is  
6 part of St. Luke's Roosevelt, and that's where they went  
7 through the prophylactic medications that Ms. Smith, Cypress  
8 Smith, would have to take to prevent any possibility of  
9 sexually transmitted diseases.

10 And, for the first time, and this is, again,  
11 around 5:23 p.m. on the seventeenth: Skin warm, excoriation  
12 on right cheek and another on back of neck right side, some  
13 scabbing, neck supple, tenderness with palpation to the  
14 posterior side.

15 So, on touching or probing the back of her neck  
16 with the doctor's hands, palpation, there was some  
17 tenderness, and, for the first time, there is a notation  
18 about the scratch, and I submit the testimony of Laketa  
19 Smith is that she brought that to the attention of the  
20 doctor because she testified that she took the picture while  
21 she and her daughter were walking on the sidewalk or on the  
22 street to the Spencer Cox Center and she noticed this on the  
23 back of her daughter's neck, but it was not noted during the  
24 physical examination at the hospital on the day of the  
25 incident. It wasn't noted by the person who did the

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1 physical exam.

2 And then when Dr. Singh performed the fifteen  
3 steps of the sex offense forensic evidence kit, colloquially  
4 known as the rape kit, she, on two independent occasions  
5 during the course of the fifteen-step exam, Dr. Singh had  
6 Cypress Smith disrobe completely and had an opportunity to  
7 view her, and on neither of those two occasions did Dr.  
8 Singh observe the scratch to the back of Cypress Smith's  
9 neck.

10 So, there is a question, I submit, whether that  
11 scratch existed or it was as a result of the events in the  
12 apartment between Lonnie Harrell and Cypress Smith or  
13 whether this scratch took place after she was discharged  
14 from the hospital and prior to coming into the Spencer Cox  
15 Center the next day. It's impossible to know the answer to  
16 that question, I submit to you.

17 Dr. Singh said it's easy to overlook a scratch on  
18 someone if it hasn't scabbed up, it might not be observable,  
19 but there were three opportunities to look during the  
20 physical exam by the intern and twice during the two of the  
21 steps of the forensic exam where Cypress Smith had to  
22 disrobe. There was that injury, alleged injury, that  
23 scratch, was never observed.

24 And, finally, Laketa Smith, Cypress' mother, while  
25 she testified that she took the picture on the seventeenth

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1 while walking in the street, she did not share it with the  
2 District Attorney's Office until September of 2015, over a  
3 year after the incident in question. So, I'm not sure what  
4 to make of that, but I suggest that it's a possibility, it  
5 is a reasonable inference, that this scratch didn't result  
6 from what happened between the complainant and the defendant  
7 in the apartment on July 16th, 2014 at approximately two to  
8 two-fifteen to two-twenty in the afternoon.

9 I just have a few more comments to make on some of  
10 the forensic evidence in the case. Just briefly about the  
11 phone records. The phone records of the complaining witness  
12 indicate there was one call where maybe it rang once, twice.  
13 Nobody can know how many times it rang.

14 There is an alleged call between the defendant and  
15 the complainant, and according to the complainant's  
16 narrative, when the defendant was about to leave the  
17 apartment, he asked for her phone number, she gave it to him  
18 and he called it to make sure he had been given the correct  
19 number, and as soon as the phone rang, the call ended.

20 In the complaining witness' phone records, that  
21 brief call is noted to have taken place, I believe at  
22 two-twenty in the afternoon. In the defendant's phone  
23 records, that call does not appear, although there are ten  
24 calls from the defendant's phone to the complaining  
25 witness', Cypress Smith's phone, beginning, I believe, at

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1 2:23 p.m. and going to -- let me give you the precise time  
2 -- there are ten phone calls of the records of the  
3 defendant's phone to Cypress Smith's where the ten calls go  
4 from 2:23 p.m. and thirty seconds until 2:28 p.m. and  
5 thirty-five seconds. The call that's at two-twenty and  
6 fifty seconds doesn't appear.

7 And the phone, the original -- there were two  
8 phone related witnesses at trial. The first gentleman  
9 testified ultimately on cross-examination that new  
10 technology came into being prior to responding to a request  
11 for Cypress Smith's phone records and that's why they were  
12 able to get that call on Cypress Smith's phone. The request  
13 for the defendant's phone records was made back in January  
14 of 2015. The technology wasn't available at that time,  
15 therefore, that call doesn't show up.

16 But, he also admitted that once this new  
17 technology came on line which enabled them to get Cypress  
18 Smith's phone records that included that call, there was not  
19 a subsequent request for the defendant's records to sort of  
20 confirm that on his records the same call shows up. Maybe  
21 it's much ado about nothing, but it's interesting that on  
22 the defendant's records that initial call, which is a part  
23 of the complaining witness' testimony of how things went  
24 down in the apartment that day, that was not part of the  
25 defendant's phone record.

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1 Let me also address the DNA evidence in this case.  
2 Could I have this displayed, your Honor?  
3 (Court officer complies.)

4 MR. HERLICH: With regard to the straw that was  
5 recovered from the glass on the kitchen counter, the DNA  
6 analysis was a full analysis of, I believe, fifteen loci or  
7 points on the chromosome that they're looking at or the  
8 chromosomes that they're looking at, and using the  
9 statistics that we used, Lonnie Harrell is the only person  
10 on the planet earth that could have contributed that DNA to  
11 the straw.

12 And, likewise to the rim of the coffee cup that  
13 was recovered from the trash can, same thing, Lonnie Harrell  
14 is the only person on planet earth that could have  
15 contributed that DNA.

16 So, there is no dispute that Lonnie Harrell came  
17 into her apartment and had a Smoothie with her and the DNA  
18 evidence supports that a hundred percent. The question: Is  
19 Lonnie Harrell -- well, there are a number of questions for  
20 your consideration in this case, but question number one:

21 Is Lonnie Harrell the contributor to the DNA that  
22 was recovered -- there was DNA from Lonnie -- not from  
23 Lonnie Harrell but from the crime victim in this case, the  
24 alleged victim, and there were three items: Dried secretion  
25 swab 1.4.1 from the bilateral labia, a dried secretion swab

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1 1.4.3 from the bilateral labia and the vulva swab. Those  
2 three generated profiles that are up there and these are  
3 from Y chromosome analysis.

4 As the expert DNA witness testified, doing a full  
5 complement DNA analysis, the autosomal analysis, I believe,  
6 was the phrase she testified to, test for fifteen loci  
7 across the entire DNA double helix.

8 The labium and vulva swabs for the DNA of Cypress  
9 Smith, whatever DNA may have been there as well was masked  
10 by the overwhelming contribution of DNA from Cypress Smith.  
11 So, what they did at the OCME lab was to do these swabs, the  
12 vulva swab and labial swabs, and try to do special testing  
13 only designed to look at various loci or points on the Y  
14 chromosome that could only have come from a male, male donor  
15 A, and they developed a genetic profile using the Y  
16 chromosome analysis as to the labial which would be two  
17 labia swabs and the vulva swab.

18 And the biological material on those swabs was  
19 amylase, which is enzyme akin to saliva. The oral swab,  
20 which was from the swab remains fraction, and the actual --  
21 they take part of the Q-tip swab and actually test that for  
22 biological material, and that was positive for the presence  
23 of semen and that's what gave actually less genetic  
24 information for whatever reason.

25 As you see, there are a number of empty spaces in

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1 the profile that was generated from the oral swab and the  
2 statistics reflect that, okay?

3 The statistics indicate, and this was brought out  
4 on cross-examination, and I'll note that the prosecutor  
5 didn't ask her witness about these statistics, so I did.  
6 She did ask about the statistics from the full complement of  
7 fifteen point autosomal genetic profile because it showed  
8 Lonnie Carrell was the only person on planet earth that  
9 could have made that contribution to the straw and the  
10 coffee cup.

11 But, with regard to the Y chromosome analysis,  
12 with regard to the dried secretions from the bilateral labia  
13 and the vulva, the analysis, the statistical analysis,  
14 showed, okay, the Y STR. DNA profile of Lonnie Harrell  
15 matches the DNA profile of male donor A. He or one of his  
16 paternal male relatives could be the source of this DNA.

17 Then, when you look at the statistics, one in six  
18 hundred eighty-five African males, thousands of individuals  
19 in New York City, could have contributed that DNA to the  
20 labia and vulva of the complaining witness if you want to  
21 speak scientifically about this.

22 And the semen, the testing of the semen, the Y  
23 chromosomal testing of the semen, because there was even  
24 less points that they could actually determine in generating  
25 a Y chromosomal profile, one in three hundred twenty-one

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1 African males could have contributed the DNA to the Y  
2 chromosome of DNA.

3 So, those statistics are even worse from the  
4 prosecutor's point of view. Thousands of people in New York  
5 City could have made the contribution, okay? And this  
6 record is in evidence and you can -- you will have a chance  
7 to look at the statistics.

8 I just want to go through, very briefly, I mean,  
9 one way of putting this very clearly is to say that as a  
10 result of the Y chromosomal analysis, Lonnie Harrell cannot  
11 be excluded as a contributor to that DNA profile. As the  
12 contributor, he can't be excluded but he can't be ruled in  
13 either. You can't rule him out, but it doesn't mean it's  
14 him that made the contribution.

15 It's very different when it comes to the straw and  
16 the coffee cup. He's the only person on plant earth who  
17 could have contributed the amylase, the saliva, to the  
18 coffee cup and the straw. And, in fact, Ms. Tamariz  
19 indicated that the Y STR profiles are useful especially for  
20 making exclusions of people, or, in this case, alleged  
21 inclusion. You can't rule him out.

22 So, I want to just give you one question and  
23 answer from page 336 at the bottom, it's the direct  
24 testimony of the expert DNA witness, Ms. Tamariz, and I'll  
25 comment on it:

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1 "Question: And that -- we're talking about the Y  
2 chromosomal DNA analysis -- and that DNA, if you can tell us  
3 again how that DNA matched, the word matched, or how that  
4 related to that of Lonnie Harrell's DNA strain profile.

5 "So the profile that we recovered from the samples  
6 is the same as the profile of Mr. Harrell."

7 So, my comment would be: True, but it could be a  
8 bit misleading. Because if you look again at these numbers,  
9 the Y chromosomal analysis from Lonnie Harrell, yes, it  
10 matches the Y chromosomal analysis of the vaginal swabs, the  
11 vulva swab and the labia swabs on all of the points that  
12 were looked at, and on the oral swab, based on the swab  
13 taken from the complaining witness' mouth, like I said,  
14 there is a lot of missing data points.

15 But, all that can be said is that it does not  
16 exclude Lonnie Harrell, but to call it a match is a  
17 misleading term of art. Because the only match in this case  
18 with DNA is the match on the straw and the match on the  
19 coffee cup, so...

20 I just ask you to take into consideration that the  
21 Y chromosomal analysis gives you statistics that are almost  
22 meaningless, or, put another way, they don't rule out Lonnie  
23 Harrell and they don't rule out any Hispanic male relatives  
24 and they don't rule out thousands of African males simply in  
25 the confines of New York City, let alone in the United

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1 States or in the world.

2 So, you're going to have to determine a couple of  
3 things: One: Did these acts take place. Did they take  
4 place by forcible compulsion. And by forcible compulsion,  
5 the Judge will instruct you on that meaning, but was it  
6 either through the use of force or the threat of force.

7 And I submit, or I ask you, to take into  
8 consideration the points I've made from the medical record  
9 and the testimony of the Detective Barbato and Dr. Singh,  
10 that the complaining witness, when she had given narratives  
11 of the events, didn't always give the exact same story. If  
12 she was consistent about one thing, she consistently left  
13 out the fact that there was even penis to vaginal contact at  
14 all in this case.

15 Secondly: I ask you to consider the fact that  
16 she, herself, the complainant, admitted that with regard to  
17 the alleged penis to the vagina contact, when she asked the  
18 defendant not to do it, not to insert his penis into her  
19 vagina, on that particular instance, he honored her request  
20 and did not use force or threat of force. He didn't in fact  
21 insert his penis in her vagina.

22 And with regard to use of force, the medical  
23 records should assist you in determining the credibility of  
24 the witness. She kept saying she was choked with two hands  
25 by the defendant and that the choking took place on two

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1 occasions, I believe. From her testimony, it took place  
2 twice during the course of the alleged sexual assault, and  
3 to the ambulance people, at least, she complained of pain to  
4 the neck, to the right side of her neck and redness, but the  
5 photograph taken at the hospital only some hours later shows  
6 absolutely no redness to the right side of the neck.

7 And, again, I can't tell you what the picture  
8 shows you, but it doesn't appear to me to indicate scratches  
9 to her cheek. It's redness. It could be pimples. I can't  
10 tell. That's for you, the jury, to decide. But the  
11 photograph clearly shows no redness to the right side of her  
12 neck.

13 And, again, I've already called your attention to  
14 the fact that the scratch on her back, the upper back below  
15 the right rear side of her neck, was not noted by -- during  
16 the course of three examinations, one by the intern, two by  
17 Dr. Singh where the complainant was completely unclothed at  
18 the emergency room where they were looking specifically for  
19 injuries, because if they found any indicia of injury, they  
20 could photograph it, and the only photograph that's in  
21 evidence from the hospital is of the right cheek of the  
22 complaining witness.

23 So, look carefully at the medical records to  
24 determine whether the force that Cypress Smith claims was  
25 used during the course of this incident was in fact used. I

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1 submit to you that the evidence is consistent with the fact  
2 that force was not used.

3 She said she had a sore throat, but the pain level  
4 was zero when she was discharged from the hospital, and I  
5 think the record is also clear that -- it's consistent with  
6 the fact that she -- her genitalia were without any type of  
7 trauma. They were, and she appeared to be, other than the  
8 alleged abrasion on the side of her face, she was normal  
9 appearing or healthy appearing. And, for those reasons,  
10 that would be consistent with the findings that this was  
11 consensual sex between Lonnie Harrell and Cypress Smith.

12 Of course, if you find that the sex act took  
13 place, she was underage, and, as a matter of law, based  
14 simply on her age, without any requirement of forcible  
15 compulsion, the last two counts in the indictment, criminal  
16 sexual act in the third degree dealing with the defendant's  
17 mouth to the complainant's vulva and the defendant's penis  
18 to the complainant's mouth, the defendant would clearly be  
19 guilty of those two counts if you found that the sexual act  
20 testified by the complainant took place.

21 But, when it comes to the forcible compulsion  
22 issue, I ask you to look carefully at the medical record  
23 before -- entered for you to determine whether the People  
24 proved beyond a reasonable doubt that forcible compulsion  
25 was used during the course of this event.

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1 And, if you find that there was no forcible  
2 compulsion, then you must find the defendant not guilty of  
3 all counts other than the last two counts that will be  
4 submitted for your consideration.

5 Thank you.

6 THE COURT: Thank you, Mr. Herlich.

7 Ms. Park.

8 MS. PARK: She hadn't even had her Sweet 16th yet.  
9 She wasn't even old enough to drive. She just finished her  
10 first year of high school. She was only fifteen-years old.

11 She wasn't supposed to be calling Nine-One-One  
12 crying that someone had sexually assaulted her. She wasn't  
13 supposed to be telling a room full of uniformed cops that  
14 her neighbor had violated her. She certainly wasn't  
15 supposed to have swabs inserted in her vagina, and she  
16 wasn't supposed to come before you, face her attacker and  
17 tell you the intimate details of what happened to her that  
18 one horrific day last summer.

19 This is not what a fifteen-year old should look  
20 like. But it's Cypress' reality because it happened to her  
21 and evidence proves that the defendant is guilty.

22 My burden is twofold: One, I have to prove all  
23 the elements of all the crimes charged, and two, I have to  
24 prove identification, that the defendant was the perpetrator  
25 of all the crimes.

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1           Let's start with the second one because this one  
2           is easy. I say it's easy because it's not really in  
3           dispute. This isn't a case involving a stranger. Cypress  
4           knows the defendant. He has known her from about 2009, 2010  
5           until this incident occurs. He lived next door to her.  
6           He's been to her apartment before. He did maintenance work  
7           inside for the family. From the very beginning, Cypress  
8           said Lonnie is my neighbor. So identification, I submit to  
9           you, is not really in dispute. He's not claiming that  
10          someone else did this. It was me but I did not do it.

11          Next, all the elements of the crimes. The  
12          evidence in this case proves beyond a reasonable doubt each  
13          and every element. And let's start with who Cypress Smith  
14          is. Was she credible? Was she accurate? Was she reliable?

15          And the answer is a resounding yes, yes, yes.  
16          She's that girl who does her homework in the room they call  
17          The Learning Center. She is the girl who spent two weeks in  
18          Montana volunteering for senior center and a day-care  
19          center, building sheds in a Native American reservation.  
20          She's the girl who wants to be productive even during her  
21          summer vacation. So after coming back from Montana, she had  
22          plans to go to summer camp. She's the girl who hopes to go  
23          to college after she finishes high school.

24          But, you all saw her here. I ask you to go back  
25          to that Tuesday of last week. You know who she is. You

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## Summation - The People

1 remember the way she spoke, her demeanor, the way she  
2 answered questions. She was quiet. Respectful. And I  
3 submit to you that she was credible.

4           You remember when she was on the stand at times  
5 she had her head down. When I asked her to talk about the  
6 sex acts, she had her head down and she was in tears. She  
7 cried. She could barely look in the defendant's direction,  
8 having to recall that day, that afternoon, when she was  
9 alone in the apartment being humiliated, violated, so  
10 terrified. It was a physical, visceral reaction to have to  
11 relive that moment.

12           We asked her to go back to that day. Tell us what  
13 happened. And she described every painful moment, both  
14 physically and emotionally.

15           And you can rely on her words. When I asked her  
16 to take a look around the courtroom, point to him and  
17 describe something that he is wearing, remember what she  
18 did?

19           She couldn't point to him. She barely looked in  
20 his direction. And she said black shirt. It was the first  
21 time she shed tears in this courtroom. Again, a visceral  
22 reaction to having to face her attacker. You cannot fake  
23 that, to face the man who violated her body in the worst way  
24 possible.

25           The defense would have you believe, because she

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1 may have gotten one or two things out of order, that she is  
2 not to be credited. A lot of things happened that day. A  
3 lot of different sex acts. And she remembered each and  
4 every one and she described them for you in details.

5 Now, what motive does she have to lie? Did she  
6 look like she was having a good time up there? Do you think  
7 she wanted to be here and be questioned about what happened?  
8 Take a four-hour train ride from Massachusetts? Miss  
9 several days of school? In the presence of complete  
10 strangers? In the presence of the defendant? And then take  
11 another four-hour train ride back to Massachusetts?

12 People lie for a reason. They lie either to cover  
13 up something when they get caught or to gain a benefit.  
14 None of that exists here. It's not as if her mother walked  
15 in on them having sex and she had to cry rape to not get in  
16 trouble. No one would have known what happened inside that  
17 apartment if Cypress didn't say anything.

18 Two: She gains nothing by coming in here  
19 testifying before you.

20 And Cypress also told you that she had a good  
21 relationship with the defendant. We all know before that  
22 day the defendant was a good neighbor. That is not in  
23 dispute. So, all the more reason she has no motive to lie  
24 about what happened. So you can credit her testimony.

25 Next: Was Cypress reliable? Was she accurate?

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A802

1 Again, the answer is yes, yes. Everything Cypress  
2 told you, almost everything, has been corroborated by other  
3 evidence.

4 When Cypress answered the door, the defendant was  
5 standing there with a blue -- with a coffee cup, and she  
6 described it as blue paper and it had white writing on it.  
7 She's careful. She pays attention to details.

8 The coffee cup -- and the police recovered that  
9 coffee cup from inside the kitchen garbage can. The rim of  
10 the coffee cup was swabbed and we obtained DNA that matched  
11 the defendant's. Again, corroborating the defendant.

12 She also told you that she made a Smoothie when  
13 the defendant came inside. She gave him some and she  
14 described the color of the straw. She said a purple straw.

15 Purple straw.

16 They swabbed the top of the straw and they got the  
17 defendant's DNA. And that was also recovered from the  
18 counter of the kitchen where Cypress said that she had left.

19 Now, Ms. Alynka Jean from NYPD lab told you that  
20 she also tried to swab the glass. We don't know how the  
21 glass broke, but it was intact when the cops recovered it  
22 from Cypress' apartment, but when -- by the time it reached  
23 the NYPD lab, it had shattered somehow.

24 Should the police have vouchered it better so it  
25 won't break? Probably. But Ms. Jean was still able to tell

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1 you that she was able to figure out the rim of the cup.

2 And the fact that they were not able to get any  
3 DNA from the rim of the cup also corroborates her testimony.  
4 Because he used the straw to drink out of the Smoothie.

5 Now, Cypress also told you that defendant choked  
6 her. Ms. Laketa Smith testified that the next day, after  
7 the attack, she noticed the scratch on her neck. And she  
8 took a picture of it, and the defense attorney showed that  
9 to you earlier.

10 Dr. Singh told you that that injury was consistent  
11 with it occurring the day before the incident, that it was  
12 also consistent with a scratch by finger, and I submit to  
13 you that that injury was caused when the defendant had his  
14 hands around her throat.

15 Now, I submit at the hospital that they simply  
16 missed it. It wasn't a significant injury. They took note  
17 of her face because it was on her face.

18 Now, Cypress also said that she recalls the  
19 photograph of the neck injury being taken on July 16th at  
20 the St. Luke's Roosevelt Hospital. But a lot of what  
21 happened to Cypress that day, especially at the hospital,  
22 she went through physical exams, she was questioned by  
23 doctors, by detectives. She was simply mistaken.

24 But her mother, her mother remembered it. She  
25 told you she was very specific about it. She told you they

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1 were walking on their way to Spencer Cox Clinic and that's  
2 when she noticed it and she took a photo of it.

3 Now, defense suggests that possibly somehow this  
4 photo was not taken the day after. Maybe it was fabricated  
5 somehow. She only told the hospital at the Spencer Cox  
6 Clinic, but not the District Attorney's Office, until  
7 recently.

8 But that makes sense. Ms. Smith is a mother who  
9 is concerned about Cypress' welfare. She noticed the  
10 physical injury so she's telling the hospital because they  
11 are the ones who treat her. She has no idea whether this  
12 photograph has any value or any weight in a criminal case.  
13 She is making concerns about her daughter's welfare.

14 You judge Ms. Smith's credibility. She is a  
15 working mother who raised Cypress and Journey. You saw the  
16 way she testified. She could have made the defendant out to  
17 be a monster, but she did not. She called him a good  
18 neighbor. That he hung out with her son. That she  
19 appreciated that he spent time with her son. So you can  
20 rely on her testimony.

21 And about the phone contacts between Ms. Smith and  
22 the defendant, that is of no moment. We know he was  
23 spending time with her son. So, of course, she's going to  
24 have his phone number. And he did maintenance work for the  
25 building. So, of course, he's going to have her number.

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## Summation - The People

1 Now, you also heard Cypress tell you that the  
2 defendant grabbed her cheeks and squeezed them together to  
3 force his penis in her mouth. I submit to you that injury  
4 on her face, and if the photographs don't clearly show the  
5 injuries, read the medical records. The medical records  
6 make note of it. And that injury, I submit, was caused at  
7 that time when he grabbed her cheeks.

8 Defendant put his penis inside Cypress' mouth and  
9 ejaculated. She told you she felt a salty liquid inside of  
10 her mouth. And Ms. Tamariz told you that there was presence  
11 of semen. There was not enough to do a full DNA chromosomal  
12 profile like with the cup and the straw, but there was  
13 presence of semen, there was presence of male DNA, from her  
14 oral swab.

15 And she explained to you about the Y chromosome,  
16 and it's true, that it's not a direct match to the  
17 defendant. And I told you that in my opening statement,  
18 that it was simply consistent with his DNA, that it could be  
19 him or any of his paternal relatives.

20 But is he suggesting that he came into the  
21 apartment, had the Smoothie, coffee cup with him and then  
22 someone else came in and sexually assaulted her?

23 No, no one is saying that.

24 And it makes sense that only a slight trace of the  
25 semen was left in her mouth. Let's think about what

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1 happened between the time defendant ejaculated in her mouth  
2 and the time they swabbed her.

3 They took a swab from her mouth. Cypress told you  
4 that she spit out the ejaculate onto her underwear. And we  
5 know the defendant took the underwear with him because the  
6 police did not recover it. And Cypress told you that he  
7 took it with him. About four hours had past before the  
8 swabbing. And, lastly, she drank water before she was  
9 swabbed.

10 Ms. Tamariz told you about the mouth area and why  
11 they typically don't recover any foreign DNA. You're  
12 constantly swallowing, talking, eating, spitting. So all of  
13 this stuff will increase the chance for you to wash away  
14 whatever foreign DNA could be in there.

15 But you know what?

16 You don't need an expert to tell you that. You  
17 don't need an expert to tell you that. Think about it.  
18 Close your mouth and don't swallow. See how long you can  
19 keep it there. Because after a few minutes, saliva will  
20 develop and you will have to either swallow or spit it out.

21 Cypress also told you that the defendant put his  
22 fingers inside her vagina and rubbed his penis against her  
23 vagina. You heard testimony again from Ms. Tamariz about  
24 the Y strain. Presence of male DNA. Male chromosome from  
25 the vulva swab and the labia swabs. Her genital areas.

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A807



1           The forensic evidence isn't about proving who did  
2           it. We're not -- we're not saying if that -- that this  
3           evidence, the Y strain evidence, proves that the defendant  
4           is the person who perpetrated the crime. Identity is not an  
5           issue. There is presence of male DNA and that's to show you  
6           that sex acts occurred. Every area that Cypress told you  
7           that he touched, there is presence of male DNA, her oral  
8           swab and the swabs from her vaginal area.

9           Cypress also told you that defendant asked for her  
10          phone number and called to make sure that she gave the  
11          correct number. Once her phone rang, he hung up. And you  
12          all saw the phone records. Cypress' phone records that  
13          showed a call from the defendant's phone at 2:20 p.m., an  
14          incoming from the defendant's call.

15          And Mr. Sierra from T-Mobile, he explained to you  
16          about that call. He demonstrated how it was as if a caller  
17          called the number and hung up after the first ring.

18          And that he explained that the call did not appear  
19          in Cypress' call detail records or the defendant's cell site  
20          records or his call detail records because it never got  
21          picked up by the device, meaning Cypress never picked up the  
22          phone, nor did it ever go to his voice mail because he let  
23          it ring, made sure she gave the correct number and hung up.

24          Cypress' records, which he called the media cell  
25          site records, the technology didn't exist at the time the

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1 defendant's cell site records were pulled. So what's the  
2 suggestion, that Cypress' media records, the cell site  
3 records, have somehow been fabricated?

4 It's T-Mobile records. It's in evidence. You can  
5 examine it.

6 Now, after defendant left Cypress' apartment, she  
7 called Nine-One-One. We know that Cypress called  
8 Nine-One-One from her cell phone at 2:23:29 p.m. You heard  
9 that Nine-One-One call and that call lasted less than ten  
10 minutes.

11 From 2:23:30 p.m. to 2:28:35 p.m., five minutes,  
12 the defendant called Cypress' phone ten times, all going to  
13 voice mail, and those calls are reflected in the defendant's  
14 phone records because it made contact with Cypress' device.  
15 It went to her voice mail and I believe it went to her voice  
16 mail because she's on the phone with Nine-One-One.

17 I submit to you that Cypress' words alone convict  
18 the defendant of every single charge that he's charged with.  
19 Her testimony before you is all you need to find the  
20 defendant guilty.

21 And, as compelling as she was, as convincing as  
22 she was, you don't need to rely on her words alone because  
23 you have all the other evidence which, of course, are her  
24 words. There are nine ways that we know that nothing  
25 Cypress did or the defendant did to her was consensual. She

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1 was compelled to engage in sex against her will by force.

2 One: Cypress' demeanor and manner in which she  
3 testified in court.

4 Two: The Nine-One-One call.

5 Three: Officer Castillo and Lora's description of  
6 Cypress.

7 Four: Officer Semper-Martinez' description of  
8 Cypress.

9 Five: Cypress undergoing the SAFE exam.

10 Six: Cypress' injuries.

11 Seven: Her mother's actions.

12 Eight: Her father's actions.

13 And, nine: Defendant's flight.

14 I will start with the first one, Cypress' demeanor  
15 and manner in which she testified here. I already went over  
16 it and I just ask you to recall the moment when she took the  
17 stand.

18 Two: Cypress' Nine-One-One call immediately after  
19 the defendant left the apartment. And I'm going to play a  
20 portion of it in a minute. And this time I ask you to just  
21 not listen to her words, but to listen to how she is  
22 speaking, what she must have been feeling, the way she is  
23 whispering, the way she begs the operator: Please, please,  
24 don't send the sirens. You can feel her fear. She is  
25 scared that the defendant will find out that she is calling

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1 the police.

2 And the call is also so obvious that she is just a  
3 child wanting her mother. Can I please hang up and call my  
4 mom?

5 (Whereupon, the Nine-One-One call was played in  
6 open court.)

7 MS. PARK: That is not a call of someone who just  
8 had consensual sex. That is a call for help by a child who  
9 was just sexually assaulted. If it was consensual, why  
10 would Cypress call Nine-One-One?

11 How many people call Nine-One-One after having  
12 consensual sex?

13 People don't do that. They call Nine-One-One to  
14 get help.

15 Defendant wants you to believe that somehow maybe  
16 this was all an act. That when he left the apartment, maybe  
17 everything was fine. But listen to that Nine-One-One call.  
18 That is not an act. That is the way she was feeling at that  
19 moment, the fear you can feel.

20 And I can stop right here. That Nine-One-One call  
21 with her testimony is all you need to know that every single  
22 thing that happened in that apartment was by force. But  
23 there's more.

24 Three: We have Officer Castillo and Officer  
25 Lora's testimony. They were the first officers to arrive.

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1 And you actually heard them knocking on the door in the  
2 Nine-One-One call towards the end of that call.

3 When Cypress opened the door, Officer Castillo  
4 described her to be crying uncontrollably and saying  
5 repeatedly: Is he gone, is he gone, come inside.

6 Officer Castillo told you that it was police  
7 procedure to not lock the door for their safety. But,  
8 because she was shaking so much, he felt that he had to do  
9 what she had asked and he allowed her to lock the door.

10 Officer Castillo also told you that she could  
11 barely speak, speaking almost in a whisper. Tears on the  
12 side of her face. Boogers coming out of her nose. Can you  
13 picture it?

14 Officer Lora described her as crying, nervous,  
15 shaking. She couldn't really get the words out of her  
16 mouth. She was shaking. She was scared. You can feel the  
17 fear that Cypress felt at that moment. And, again, those  
18 actions are not someone who just had consensual sex but  
19 someone who was sexually assaulted.

20 Four: Officer Semper-Martinez' testimony. She  
21 and her partner, Officer Mateo, arrived shortly after the  
22 first two officers. They thought a female officer would  
23 make Cypress feel a little more comfortable.

24 And Officer Semper-Martinez described Cypress as  
25 follows: Shaken up, she was crying, her voice was very low,

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1 she was shaking.

2 And Mr. Herlich asked these two officers about  
3 notes. How can you remember this from over a year ago  
4 without taking any notes? The question is: Not how can  
5 you remember this. The better question is: How can you  
6 forget her?

7 Five: Cypress undergoing the SAFE exams. Cypress  
8 arrived at the hospital about 3:40 p.m., left about  
9 midnight, one o'clock. She was in the hospital for over  
10 eight hours.

11 In addition to undergoing physical exams for about  
12 two hours, she had to undergo the SAFE exams. It was a very  
13 invasive SAFE exam which included getting her private areas  
14 swabbed, getting her pubic hair combed, standing in front of  
15 a doctor naked, full exposed.

16 And Dr. Singh went over with you all the fifteen  
17 steps that had to be done.

18 I submit to you that someone who just had  
19 consensual sex is not subjecting herself to that. Someone  
20 who was sexually assaulted is.

21 Six: Cypress' injuries. While her injuries were  
22 not significant, she had injuries that was consistent with  
23 what the defendant did to her.

24 And I don't have to prove to you physical  
25 injuries. The scratch on the back of her neck right side,

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1 her medical records says that patient is complaining of pain  
2 to the right side of the neck, possible or positive redness  
3 to the right side of the neck, abrasion, scratch to the  
4 right cheek, all consistent with the defendant's hands on  
5 Cypress.

6 There was no injuries to Cypress' vagina. Cypress  
7 told you that he never penetrated her with his penis.  
8 However, he did penetrate her with his fingers.

9 And remember what Dr. Singh told you about that?  
10 That you would not expect to see genital injury with finger  
11 penetration. She said that the finger might not cause any  
12 trauma. The area tends to heal very quickly. In most cases  
13 of sexual assault, it's very rare to see any evidence of  
14 injury. And she also said the lining of the vagina is  
15 pretty elastic so it doesn't easily tear or get injured.

16 Seven: Cypress' mother's actions. Ms. Laketa  
17 Smith testified that she rushed home after she received that  
18 phone call from the police officer and Cypress. And you can  
19 see from Cypress' call detail records, which is in evidence,  
20 that at 2:37:13 p.m., she called her mother and her mother's  
21 phone number ends in seven-four-seven-five. Ms. Smith told  
22 you that Cypress sounded scared, like she had been crying,  
23 her voice was shaky and kind of broken.

24 When Ms. Smith saw Cypress in the apartment, she  
25 described her as physically shaking, it was clear that she

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1 had been crying. Her face was swollen and her eyes were  
2 red.

3 And Ms. Smith broke down on the stand when she  
4 said that she has never seen her daughter in that state  
5 before. Can you imagine what a mother must have felt at  
6 that moment? Feeling so helpless, not having been able to  
7 protect her daughter? Watching the aftermath of her  
8 daughter having gone through something so horrific?

9 Ms. Smith's reaction speaks volumes about the  
10 non-consensual nature of the sex acts.

11 She also told you that she took about two and a  
12 half to three weeks off from work to make sure that Cypress  
13 went to all of her appointments and not wanting Cypress to  
14 be alone. Again, you are not going to appointments if the  
15 sex was consensual.

16 Eight: Cypress' father's reaction. Both Cypress  
17 and her mother told you that her father, who at that time  
18 lived in Georgia, rushed to be by Cypress' side. Again,  
19 evidence that Cypress was sexually assaulted.

20 And finally, nine: Defendant's flight. We know  
21 from defendant's cell sites that he's still at Ninety-Two  
22 St. Nicholas Avenue. So I'm going to ask you to look at the  
23 cell sites with me.

24 We know from his cell sites that at 2:23:30 he's  
25 still at Ninety-Two St. Nicholas Avenue. You heard from Mr.

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1 Delitta, the cell site expert, that these five calls were  
2 hitting the cell tower right here at One-Sixteenth and St.  
3 Nicholas Avenue -- actually, between One-Sixteenth and  
4 One-Fifteenth and St. Nicholas Avenue, and if you're at  
5 Ninety-Two St. Nicholas Avenue, you would most likely hit  
6 that tower or possibly through this tower.

7 When I asked him about this cell tower, the one at  
8 One-Eighteenth and Lenox Avenue, he said it most likely  
9 would not hit that tower if you were at Ninety-Two Second  
10 Avenue.

11 So, we know by 2:25:23 p.m., which is after five  
12 calls to Cypress' phone, all going to voice mail, that he is  
13 starting to move. And by 2:42:42 p.m. he is on the other  
14 side of Manhattan, and he's using the tower that's located  
15 at One-Twentieth and First Avenue, and Mr. Delitta told you  
16 about the range of that cell tower, three to four block  
17 radius.

18 So, the defendant is somewhere in this area, not  
19 here. And that's two forty-two, which is about fifteen  
20 minutes after he left the apartment.

21 Now, what do these cell sites tell you?

22 I submit that after he left Cypress' apartment, he  
23 gets concerned. He thinks maybe Cypress will call someone  
24 and that's why he starts making that call. And he panics,  
25 she's not picking up.

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1 And we all know from having cell phones, or having  
2 used cell phones, that when you're trying to call someone,  
3 there is a specific ring tone that the other side makes. If  
4 that person is on the line, it will just ring and go beep or  
5 something like that. And that's what he heard. So he knew  
6 she was on the phone. And that's why they are -- in that  
7 five minute time period, he's calling Cypress ten times.  
8 And he's starting to make his way across town.

9 I submit to you that the defendant realized that  
10 it's only a matter of time before the police arrive at the  
11 apartment and that's why he ran, because he knew what he had  
12 done was wrong, that there was no consensual sex of any  
13 kind.

14 Now, there's something else that is noteworthy  
15 about that call at 2:42:42 p.m. That was the last call on  
16 that phone. There are no more phone calls from that phone.  
17 Why is the defendant all of a sudden not using that phone?

18 I submit to you he doesn't want to be tracked. He  
19 has to get rid of that phone. It contains the evidence that  
20 he committed a crime. It has naked photos of Cypress and it  
21 has calls that he made to Cypress.

22 And we know that the defendant had that phone at  
23 least as far back as February of 2014, and, all of a sudden,  
24 at 2:42:02 p.m., fifteen minutes after the assault, the  
25 phone goes dead?

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1           You might be asking: And why would the defendant  
2           have done this?

3           And I don't have to prove motive to you. But who  
4           knows why people do what they do. Who knows why people  
5           commit crimes. Why people do such horrible things.

6           And I submit to you that, here, the defendant saw  
7           an opportunity. He went -- he saw Cypress was alone, and  
8           having been so close to the family, he knew the mother  
9           wasn't home. He knew she wasn't going to be home for hours.  
10          He knew Journey wasn't home. He knew Journey wasn't going  
11          to be home. And he thought he could get away with it. He  
12          thought he had sufficiently silenced her by threatening her,  
13          by saying: If you tell anyone, I'm going to hurt your mom.  
14          If you tell anyone, I'm going to show these naked pictures  
15          of you and everyone will know what you have done.

16          Cypress was overcome with fear that day and she  
17          did what her instinct told her to do, and that was to call  
18          Nine-One-One.

19          There you have it, nine ways that we know the sex  
20          acts was not consensual. You didn't need them all, but you  
21          have them.

22          Now I'm going to go through the elements of the  
23          crime and I'm going to start backwards. I'm going to start  
24          with the statutory counts.

25          Now, count seven, that's criminal sexual act in

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1 the third degree. This is the penis to mouth contact. And  
2 was there contact between the defendant's penis and Cypress'  
3 mouth?

4 Cypress testified that he put his penis in her  
5 mouth -- yes, that he grabbed her mouth and put his penis in  
6 her mouth. So, for this charge, no force is necessary.

7 Defendant was twenty-one years old or older.  
8 Detective Barbato told you that when she arrested the  
9 defendant, she took pedigree information from him and that  
10 included his date of birth. His date of birth was December  
11 27, 1962 which makes him fifty-one at the time of the crime.

12 And you saw the defendant when he was in court.  
13 He appears to be his stated age. So there is no doubt that  
14 the defendant was twenty-one years old or older at the time  
15 of the crime.

16 Cypress was less than seventeen-years old.  
17 Cypress told you that her date of birth was April 21st,  
18 1999. Her mother told you that she was born on April 21st,  
19 1999. The birth certificate prove that she was born on  
20 April 21st, 1999. Which makes her fifteen on July 16th,  
21 2014. So that element has been satisfied.

22 Count six, criminal sexual act in the third  
23 degree, and this will be the mouth to vulva contact. Was  
24 there contact between the defendant's mouth and Cypress'  
25 vulva?

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1 Cypress testified that she felt his mouth and his  
2 tongue in her vagina. And although Cypress never used the  
3 word vulva, we know as adults what that term refers to, the  
4 external area, and I submit that at fifteen she doesn't know  
5 -- she doesn't know the difference between a vulva and a  
6 vagina.

7 And common sense tells us that in order to get to  
8 the vagina, you have to touch the vulva. You have to get  
9 past it. It's like -- I hate to be so graphic -- but it's  
10 like the Tootsie Roll candy. You can't get to the jelly  
11 part inside until you go through the hard part.

12 Again, for this charge, there is no requirement  
13 that any force be used.

14 Two: The defendant was fifty-one years old.

15 And, lastly, Cypress was fifteen-years old.

16 And for these charges, I don't have to prove to  
17 you that the defendant knew Cypress was fifteen-years old at  
18 the time of the crime, but I submit to you that he did know.  
19 He knew the family. He first met the family in 2009, 2010  
20 and Cypress was only ten-years old at the time. He spent  
21 time talking to her about her school. He knows the family.  
22 So, I submit to you he knew she was fifteen-years old.

23 Count five, sexual abuse in the first degree.  
24 This would be the mouth to mouth contact. Did the defendant  
25 subject Cypress to sexual contact? Is the mouth an intimate

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1 part of a body? And was it for the purpose of gratifying  
2 sexual desire?

3 Mouth by itself is not necessarily an intimate  
4 part. You use it to eat, talk or kiss the baby. That's not  
5 considered an intimate body part. But, when the mouth is  
6 being used to kiss another person on the mouth in a way that  
7 it happened here, it is an intimate part.

8 This wasn't an innocent platonic kiss between  
9 Cypress and the defendant. She told you that he kissed her  
10 and put his tongue inside of her mouth. This is an intimate  
11 act so it involves an intimate body part. When you're  
12 kissing someone and that person's tongue is inside your  
13 mouth, there is no question that it's for a sexual  
14 gratification.

15 Two: Was there forcible compulsion?

16 Before he kissed her, a lot happened. He held  
17 onto her and wouldn't let go of the hug. She tried to push  
18 him away, but he held onto her. She told him to let her go,  
19 but he did not. She kicked his shin. He grabbed her  
20 shoulders. He choked her. Brought her down to the ground.  
21 She couldn't breath. He covered her mouth, told her not to  
22 scream. He threatened her, if she screamed, I'm going to  
23 choke you out.

24 When she tried to get away, he grabbed her ankle,  
25 pulled her towards him. He then grabbed her by her hair,

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1 pulled her into The Learning Center where he forced her to  
2 sit on the stool.

3 In determining forcible compulsion, I also ask you  
4 to think about Cypress' age and her size compared to the  
5 defendant. She was only a child. He was an adult. She was  
6 five feet tall, hundred twenty pounds. He was at least  
7 five-six, hundred eighty-five pounds. She was alone,  
8 trapped in her apartment.

9 Cypress told you that she kept her mouth closed  
10 and he threatened to kiss -- he threatened her to kiss him  
11 back or he would choke her again. Of course she's going to  
12 be in fear that he would cause her physical injury. He  
13 already did. He was older, bigger, stronger. He  
14 overpowered her. He used physical force. He threatened her  
15 with physical force.

16 Any one of those acts alone constitute forcible  
17 compulsion. When you have them altogether, there is no  
18 doubt that forcible compulsion was used here.

19 Count four, sexual abuse in the first degree,  
20 finger to vagina. Now, was there contact between the  
21 defendant's fingers and Cypress' vagina?

22 I think we can all agree that a vagina is a sexual  
23 part of a person's body, and it might be stating the  
24 obvious, but when you stick your fingers inside someone's  
25 vagina, it's for sexual gratification.

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1 Two: Was there forcible compulsion?

2 I just went over the forcible compulsion with you.

3 And all of the defendant's actions are relevant here.

4 Even though the kiss came before the finger to the  
5 vagina contact, it's not as if she forgot about what the  
6 defendant did. It is still fresh inside Cypress' mind. She  
7 knows what he is capable of. She is compelled to do what  
8 the defendant tells her to do because of that fear.

9 But, what else is happening during this act?

10 Cypress cried. She told the defendant that it  
11 hurt. And he told her if you relax, it wouldn't hurt. She  
12 is crying and expressing pain. He is continuing to do this  
13 act. Telling a fifteen-year old to relax. All of that  
14 combined, there was lack of consent by forcible compulsion.

15 Count three, attempted rape in the first degree.  
16 Did the defendant attempt to engage in sexual intercourse  
17 with Cypress?

18 And the Judge will define sexual intercourse for  
19 you, but it's any penetration, however slight, of the penis  
20 into the vaginal opening.

21 Cypress told you that the defendant's exposed  
22 penis rubbed against her vagina. She told you, very  
23 honestly, that his penis did not go in.

24 Defense argues that she said stop and he did.  
25 That's not how it went. What she also said was she said it

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1       seemed to -- it seemed like the defendant was trying to  
2       insert his penis in her vagina. She asked him to stop  
3       because it hurt. He told her it won't hurt if you relax.  
4       And that's when he stopped and he didn't penetrate her. And  
5       that's why -- and that's why he's only charged with the  
6       attempted rape in the first degree.

7               Is there any doubt that he was trying to penetrate  
8       her?

9               Do you think his intent was to simply rub his  
10       penis against her and that's it?

11              Absolutely not. Rubbing your naked penis against  
12       someone's vagina is as close as you can come to penetrating  
13       them.

14              Defense pointed out that Cypress never told  
15       Detective Barbato this and she didn't tell the hospital  
16       personnel, one of the hospital personnel. But keep in mind  
17       that Detective Barbato's interview took place three hours  
18       after she had been sexually assaulted.

19              Ms. Laketa Smith's description of Cypress at the  
20       hospital is as follows: She was tired and she was scared  
21       and she sort of -- she seemed anxious. She shook a lot.  
22       She seemed shocked and dazed, like all of it was surreal.  
23       This was Cypress' condition when the detective and the  
24       doctors were interviewing her.

25              And Detective Barbato also told you that she was

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1 simply giving you a narrative of what happened. It's not  
2 like a trial like here where I was asking her specific  
3 questions for a specific charge. They weren't asking for  
4 those details.

5 Besides, a lot happened inside the apartment.  
6 Starting with the Smoothie, the physical force, the threats,  
7 the many, many different sex acts, taking pictures, the  
8 phone calls and so on. To suggest that Cypress is somehow  
9 lying or not being truthful about something because she left  
10 out that he rubbed his penis against her vagina is absurd.

11 And the medical records that Mr. Herlich pointed  
12 out for you earlier where she said -- where it said no  
13 vaginal penetration with penis but used fingers. And she's  
14 right. She never said that he penetrated her.

15 I submit to you that Cypress doesn't know, nor  
16 does she care, what elements are necessary for rape, for  
17 criminal sexual act. All she knows is what happened to her,  
18 and to her it's as simple as what she told the Nine-One-One  
19 operator: I was raped. She's not thinking about what  
20 constitutes element of rape in the first degree. She was  
21 violated. And like -- and you know the term rape is just  
22 commonly used for any sexual violation of a person's body,  
23 and that's what she was relating to the Nine-One-One  
24 operator and to the hospital personnel.

25 Two: Was there forcible compulsion?

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1 Again, you have to consider all of the defendant's  
2 actions and I won't go through it. And, as I said under the  
3 sexual abuse counts, Cypress knows very clearly what the  
4 defendant is capable of and she is still under that fear.

5 Count two, criminal sexual act in the first  
6 degree. This would be the penis to mouth contact. Was  
7 there oral sexual conduct?

8 Of course. The defendant put his penis in  
9 Cypress' mouth. That's oral sexual conduct.

10 Was there forcible compulsion?

11 In addition to the force and threats that the  
12 defendant employed up to this point, there was additional  
13 force used for this contact. Cypress told you that the  
14 defendant told her to stand up, he grabbed the back of her  
15 neck, then we saw Cypress attempting to fight back. She  
16 said that she tried to grab his testicles and twist. She  
17 saw it and she learned it in self-defense or karate class.  
18 She thought that would stop him.

19 Unfortunately, it didn't work, because it caused  
20 him to grab her neck harder. When she refused to get on her  
21 knees, the defendant grabbed her hair and pushed her down to  
22 her knees. While she was on her knees in front of him, he  
23 grabbed her face, and she demonstrated for you, putting his  
24 fingers on both sides of her cheeks and he squeezed, causing  
25 her mouth to become open and he shoved his penis in her

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1 mouth, then he grabbed her neck harder, pushing her head  
2 down so his penis would go further. That's what she told  
3 you. That he kept pushing her head so his penis would go  
4 deeper.

5 Finally, count one, criminal sexual act in the  
6 first degree. This would be the mouth to vulva contact.

7 Now, as we went over under count six, Cypress  
8 testified that the defendant put his mouth and his tongue on  
9 her vagina.

10 Was there forcible compulsion?

11 Again, we went over this many times, but what else  
12 did she say while the defendant -- while the defendant's  
13 mouth was on her vagina?

14 In Cypress' words: If I say stop, he would say  
15 you wanted this. And I said no, I didn't. And he said yes,  
16 you did want it. I said no, I didn't. He said yes, you  
17 did.

18 Now, about forcible compulsion, during jury  
19 selection we talked about whether you would expect the  
20 victim of a sexual assault to fight back. Now, you also  
21 said you would keep an open mind.

22 Cypress was alone in the apartment with the  
23 defendant. She was only fifteen, just a child. He was an  
24 adult, bigger and stronger. He had already shown her that  
25 he could overpower her, that he could hurt her. He had

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1 instilled in her fear that he would hurt her even more if  
2 she did not comply.

3 She told you that she was scared. He had  
4 threatened her during the assault. He would keep choking  
5 me. He would choke me out. He would go berserk if I didn't  
6 do what he said. She had no choice. Don't fault her for  
7 not fighting back hard enough. She did what she thought was  
8 necessary to survive, and she did.

9 But, you know what?

10 She did fight back. She called Nine-One-One, she  
11 told the police what happened and she came before you and  
12 told you what the defendant did to her.

13 When Cypress Smith took the stand last week, she  
14 was only sixteen-years old. It's not easy getting on the  
15 witness stand and having to testify in front of strangers,  
16 and we saw some of that in some of the police officers. But  
17 Cypress told you what happened to her. And you all know it  
18 wasn't easy for her because she had tears in her eyes.

19 When we began this trial, the defendant stood  
20 before you presumed innocent and I told you in my opening  
21 statement what I expect the evidence would show. But what I  
22 said in my opening is not evidence. It only became evidence  
23 when witnesses took the stand and when the physical evidence  
24 came in.

25 The defendant had his fair trial. He is no longer

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1 presumed innocent because the evidence proves his guilt  
2 beyond a reasonable doubt. Cypress' testimony alone proves  
3 his guilt. Every single one. If you believe her, the  
4 defendant is guilty, as I submit you should.

5 But, rest assured in knowing that this evidence  
6 corroborates her testimony: Nine-One-One call, Officer  
7 Castillo and Officer Lora, Officer Semper-Martinez, her  
8 mother, the medical records, irrefutable forensic evidence,  
9 the cell site records.

10 Now the time has come to do what you have all  
11 promised to do, what you have all been chosen to do, and to  
12 do what the evidence commands you to do, and that is to tell  
13 Cypress we heard you, we believe you, the defendant is  
14 guilty. Find him guilty.

15 Thank you.

16 THE COURT: Thank you, Ms. Park.

17 Okay, jurors, you heard the summations, however,  
18 you're still required to continue to follow my instructions  
19 and my admonitions to you because you have not yet heard the  
20 jury charges; in other words, you don't know how to apply  
21 the facts as you find them to the law as I give it to you  
22 because I haven't given you the law yet.

23 We're going to take our lunch recess now and I  
24 will ask you to please be back at three o'clock. When you  
25 come back at three o'clock, I will give you the jury charges

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1 and then I expect that you'll have at least half an hour, if  
2 not more, to begin your deliberations this afternoon.

3 I remind you again to please continue to follow my  
4 instructions. It may be really tempting now that you have  
5 heard the summations and heard both sides rest to begin to  
6 discuss this case or express an opinion. I ask you to  
7 resist that temptation and just put the case out of your  
8 mind and I will see you at three o'clock sharp.

9 Thank you.

10 A COURT OFFICER: Leave your books on the chairs,  
11 make sure you have all your belongings and step this way,  
12 please.

13 (Whereupon, the jury exited the courtroom.)

14 THE COURT: Okay, thank you.

15 See you at three.

16 (Luncheon recess held.)

17 \* \* \* A F T E R N O O N S E S S I O N \* \* \*

18 THE CLERK: Continuing case on trial, People  
19 versus Lonnie Harrell.

20 MR. HERLICH: Your Honor?

21 THE COURT: Yes?

22 MR. HERLICH: The only other thing that I'd ask  
23 you to charge is that, again, what you said at the beginning  
24 of the case, that in the event the defendant didn't testify  
25 they can't hold an adverse inference.

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1 THE COURT: Sure.

2 THE SERGEANT: Judge, Abe is outside waiting for  
3 all the jurors.

4 THE COURT: Okay.

5 A COURT OFFICER: (Indicating.)

6 THE COURT: We're good, let's go.

7 A COURT OFFICER: Panel entering.

8 (Whereupon, the trial jury entered the courtroom.)

9 THE CLERK: Continuing case on trial, People  
10 versus Lonnie Harrell.

11 All parties, except for the defendant, and all  
12 jurors are present.

13 THE COURT: Good afternoon, jurors, welcome back.

14 Members of the Jury, I will now instruct you on  
15 the law. I will first review the general principles of law  
16 that apply to this case and all criminal cases. You have  
17 heard me explain some of those principles at the beginning  
18 of the trial. I'm sure you appreciate the benefits of  
19 repeating those instructions at this stage of the  
20 proceedings.

21 After that, I will define the crimes charged,  
22 explain the law that applies to those definitions and spell  
23 out the elements of each charged crime. Finally, I will  
24 outline the process of jury deliberations. These  
25 instructions will take forty-five minutes to an hour. You



## Jury Charge

1 will not receive copies of these instructions, but I can  
2 repeat them for you as many times as you wish.

3 During these instructions, I will not summarize  
4 the evidence. If necessary, I may refer to portions of the  
5 evidence to explain the law that relates to it.

6 My reference to evidence or my decision not to  
7 refer to evidence expresses no opinion about the  
8 truthfulness, accuracy or importance of any particular  
9 evidence. In fact, nothing I have said, and no questions I  
10 have asked, in the course of this trial were meant to  
11 suggest that I have an opinion about a witness, the evidence  
12 or of whether the defendant is guilty or not guilty. If you  
13 have formed an impression that I do have an opinion, you  
14 must put it out of your mind and disregard it.

15 The level of my voice or intonation may vary  
16 during these instructions. If I do that, it will be done to  
17 help you understand. It is not done to communicate any  
18 opinion of the law or the facts of the case or whether the  
19 defendant is guilty or not guilty. Remember, it is not my  
20 responsibility to judge the evidence here. It is yours.  
21 You are the judges of the facts and you are responsible for  
22 deciding whether the defendant is guilty or not guilty.

23 In your deliberations you may not consider or  
24 speculate about matters relating to sentence or punishment.  
25 If there is a verdict of guilty, it will be my

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1 responsibility to impose an appropriate sentence.

2 The fact that the defendant did not testify is not  
3 a factor from which any inference unfavorable to the  
4 defendant may be drawn.

5 When you judge the facts, you are to consider only  
6 the evidence. The evidence in the case includes the  
7 testimony of the witnesses, the exhibits that were received  
8 in evidence and the stipulation by the parties.

9 Testimony which was stricken from the record or to  
10 which an objection was sustained must be disregarded by you.

11 Exhibits that were received in evidence are  
12 available upon your request for your inspection and  
13 consideration. Exhibits that were just seen during the  
14 trial or marked for identification but not received in  
15 evidence are not evidence and are, thus, not available for  
16 your inspection and consideration.

17 The testimony based on those exhibits that were  
18 not received in evidence may be considered by you. It is  
19 just that the exhibit itself is not in evidence.

20 In evaluating the evidence, you may consider any  
21 fact that is proven and any inference which may be drawn  
22 from such fact.

23 To draw an inference means to infer, find,  
24 conclude that a fact exists or does not exist based upon  
25 proof of some other fact or facts. For example, suppose you

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